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No. 93-1677

In the

Supreme Court of the United States

October Term, 1993

State of Oklahoma, ex rel.
Oklahoma Tax Commission,

Petitioner,

vs.

Jefferson Lines, Inc.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the State of Oklahoma may constitutionally impose on the in-state purchaser, and require the in-state vendor to collect, a sales tax on the purchase of bus transportation sold within the State, measured by the full purchase price of the ticket, even though the ultimate destination or a portion of the route to be travelled extends beyond the State's borders.

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OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported as *State of Oklahoma ex rel. Oklahoma Tax Commission v. Jefferson Lines, Inc. (In re Jefferson Lines, Inc.)*, 15 F.3d 90 (8th Cir. 1994), and is reprinted in the Joint Appendix at J.A. 24.

The Memorandum and Order of the United States District Court for the District of Minnesota, Third Division, has not been reported. It is reprinted in the Joint Appendix at J.A. 17. The Order of the United States

Bankruptcy Court for the District of Minnesota, Third Division, is not reported and is reprinted in the Joint Appendix at J.A. 7.

JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit was entered on January 21, 1994. The petition for writ of certiorari was filed in this Court on April 21, 1994, and was granted on June 13, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

Pertinent sections of the Oklahoma Sales Tax statutes are as follows:

OKLA. STAT. tit. 68, § 1354(1) (Supp. 1988):

> There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code, an excise tax of four percent (4%)[1] of the gross receipts or gross proceeds of each sale of the following:
>
> (A) Tangible personal property;

* * * *

[1] The rate was changed to 4½% effective Feb. 1, 1990. 1989 Okla. Sess. Laws, 1st Ex.Sess., ch.2, § 101.

> (C) Transportation for hire to persons by common carriers, including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire;

* * * *

OKLA. STAT. tit. 68, § 1361 (Supp. 1988):

> (A) The tax levied by this article shall be paid by the consumer or user to the vendor as trustee for and on account of this state. Each and every vendor in this state shall collect from the consumer or user the full amount of the tax levied by this article, or an amount equal as nearly as possible or practicable to the average equivalent thereof. Every person required to collect any tax imposed by this article, and in the case of a corporation, each principal officer thereof, shall be personally liable for said tax.
>
> (B) Vendors shall add the tax imposed by this article, or the average equivalent thereof, to the sales price, charge, consideration, gross receipts or gross proceeds of the sale of tangible personal property or services taxed by this article, and when added such tax shall constitute a part of such price or charge, shall be a debt from the consumer or user to vendor until paid, and shall be recoverable at law in the same manner as other debts.

* * * *

STATEMENT OF THE CASE

1. Nature of the Controversy

The Oklahoma Sales Tax Code imposes a tax, to be paid by the purchaser and collected by the vendor, upon the sale of tangible personal property and certain services, including transportation for hire by common carriers such as bus companies, where such sales occur within the State. The tax is added to the purchase price of the item or service purchased, and constitutes a debt from the consumer/user to the vendor until paid. The vendor becomes liable if the vendor fails to collect or remit the tax. OKLA. STAT. tit. 68, §§ 1354(1), 1361 (Supp. 1988).

Jefferson Lines, Inc. ("Jefferson") is a common carrier providing bus service in Oklahoma as well as other states, and sells tickets in Oklahoma from various locations across the state. J.A. 3–4. All of the sales here in question were made within the State. J.A. 5. Jefferson's ticket sales can be classified into two categories. The first category consists of tickets sold in Oklahoma for transportation that both originates and terminates within the State of Oklahoma. The second category consists of tickets sold in Oklahoma for transportation originating in Oklahoma and terminating in some other state. *Ibid.*

During the periods in question Jefferson, operating under an Oklahoma sales tax permit previously issued to M. K. & O. Coach Lines, Inc.,[2] collected and remitted Oklahoma sales tax only on ticket sales involving solely intrastate travel. On its Oklahoma sales tax reports, Jefferson reported all sales made in Oklahoma, but then

[2] Prior to the periods in question, M. K. & O. Coach Lines, Inc. was merged into Jefferson Lines, Inc., with Jefferson as the survivor.

deducted those sales where the ultimate destination was outside the State. J.A. 4. Taxes were not collected or remitted on those sales. The Oklahoma Tax Commission ("Commission"), conducting a routine office audit of Jefferson's M. K. & O. sales tax reports for September and October, 1989, and January and February, 1990, discovered Jefferson was not collecting or remitting tax on sales made in Oklahoma where the bus routes involved travel outside the State. The Commission disallowed the sales deductions taken by Jefferson on its sales tax reports and determined the amount of sales tax due on the deducted sales to be $46,659.15. J.A. 4–5.

2. The Proceedings Below

Jefferson filed a petition for voluntary relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Minnesota, Third Division, on October 27, 1989. On relation of the Tax Commission, the State of Oklahoma filed proofs of claim for priority taxes and administrative claims for the sales taxes that Jefferson, as vendor, was required to collect, but did not, on the bus tickets sold in Oklahoma. The bankruptcy court's jurisdiction to hear and decide those claims is provided by 28 U.S.C., § 157.

Jefferson objected to the Commission's claims, arguing that the imposition of Oklahoma's sales tax on bus tickets sold in Oklahoma violates the Commerce Clause of the United States Constitution, where the trip originates in Oklahoma and terminates in another state. J.A. 5–6. The bankruptcy court agreed, and sustained Jefferson's objection. J.A. 16.

Analyzing Oklahoma's tax on the sales in question under the four-prong test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the bankruptcy court found

that Jefferson's physical presence within the state, its conducting of sales there and its maintenance of facilities in Oklahoma both for sales purposes and for the other physical operations of its business, were sufficient both to satisfy the nexus requirement of *Complete Auto* and to show that the tax was fairly related to the services provided by the state. J.A. 11–12, 15–16.

As to the apportionment prong of *Complete Auto*, the court concluded that, since only one state could tax the sale of bus tickets occurring within its borders, the tax was internally consistent. J.A. 12. However, relying on this Court's decision in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948) (a case involving a gross receipts tax on a bus company's revenues from providing interstate transportation), the bankruptcy court concluded that the application of Oklahoma's sales tax to the gross selling price of a bus ticket, without apportionment according to the in-state miles to be travelled, taxed more than the in-state component of an interstate activity and was therefore not externally consistent. J.A. 13–14. Having concluded that Oklahoma's sales tax was therefore not "fairly apportioned," the bankruptcy court then concluded that the tax necessarily discriminated against interstate commerce. J.A. 15. Accordingly, Jefferson's objection to the Commission's claim for uncollected and unremitted sales taxes was sustained.

On appeal, the district court affirmed. J.A. 23. That court, examining only the apportionment prong of the *Complete Auto* test, agreed that Oklahoma's sales tax was internally consistent but, also relying on *Central Greyhound*, similarly concluded that by taxing the entire purchase price of an "interstate" ticket, Oklahoma "receives revenues that exceed the amount reasonably attributable to the Oklahoma leg of the bus journey." J.A. 20. For external consistency purposes, the district court opined that if another state levied a tax on *Jefferson* on the revenues it derived from the transportation of passengers within that state—again citing *Central Greyhound*—that tax would be passed on to the ticket purchaser by an increase in the price of the ticket, thus "effectively" taxing the ticket purchaser twice on the "same activity" that Oklahoma had taxed. J.A. 22. According to the court, the fact that Oklahoma levies a sales tax on the ticket purchaser, while the other state would levy its tax on the bus company, "makes no practical difference." *Ibid.* The order of the bankruptcy court was thus affirmed.

The Eighth Circuit affirmed the district court, also relying, as had the courts below, on *Central Greyhound Lines v. Mealey*. Adopting the reasoning of the lower courts, the court of appeals further opined that there was no "significant" distinction between the gross receipts (income) tax on the bus company in *Central Greyhound* and the sales tax levied here on the ticket purchaser. J.A. 28–29; 15 F.3d 92–93. Therefore, the court concluded, the lack of apportionment of Oklahoma's sales tax on the purchase of a bus ticket in accordance with the miles subsequently to be travelled in Oklahoma was as fatal for external consistency purposes as was the unapportioned-by-mileage gross income tax on the bus company in *Central Greyhound*. Consequently, the opinion and judgment of the district court was affirmed. *Ibid.*

Certiorari to review the decision of the Eighth Circuit Court of Appeals was granted on June 13, 1994.

SUMMARY OF THE ARGUMENT

The State of Oklahoma imposes a tax, levied upon the consumer and collected by the vendor, upon the sale of

tangible personal property and certain services, including transportation for hire by bus. The tax is imposed upon the sale itself, not upon the thing purchased nor upon anyone's occupation or income; and it is imposed only when the sale occurs within the State. The taxable event is complete when the *sale* is made—in this case, when the bus ticket is bought and paid for.

The courts below erroneously concluded that when the bus transportation purchased included travel outside the State of Oklahoma, the State's sales tax, measured by the full purchase price of the ticket, violated the Commerce Clause. The courts' error stems from a misunderstanding and mischaracterization of the taxable transaction at issue—the sale. This mischaracterization led the courts below to shift their focus and constitutional analysis away from the activity actually being taxed, the *sale* of transportation, to the transportation itself.

Contrary to the opinions below, the State's sales tax is not upon the purchaser's ultimate use or enjoyment of the thing purchased, nor upon the vendor's income or receipts for the providing of it. In arriving at a contrary conclusion, the courts below misconstrued the state statutes themselves, and ignored the Oklahoma Supreme Court's construction thereof.

In reaching their conclusions, the courts below relied upon a 1948 decision that is totally inapposite to the case at bar—both as to the type of tax involved and the nature of the activity taxed—and completely disregarded the applicable decisions of this Court which have upheld the states' power to tax a discrete transaction which occurs solely within the state's borders.

When seen for what it truly is, Oklahoma's tax here is a "garden-variety" sales tax imposed upon the in-state

purchaser as a result of a discrete, unijurisdictional event which no other state can tax. The tax clearly does not discriminate against interstate commerce, nor can it subject the purchaser to multiple taxation, and is legally indistinguishable from similar sales taxes previously upheld by this Court. The decisions below should be reversed.

ARGUMENT

OKLAHOMA'S SALES TAX ON THE IN-STATE PURCHASE OF TRANSPORTATION BY BUS, MEASURED BY THE FULL PURCHASE PRICE OF THE TICKET, IS COMPLETELY CONSONANT WITH ALL FOUR PRONGS OF THE *COMPLETE AUTO* TEST AND IS CONSTITUTIONALLY PERMISSIBLE, REGARDLESS OF THE PURCHASER'S ULTIMATE DESTINATION.

The United States Constitution provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." U.S. Const. art. I, § 8, cl. 3. But, in imposing taxes for state purposes, a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states to an extent which infringes the authority conferred upon Congress that the tax can be said to exceed constitutional limitations. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 (1940).

It is well settled that the purpose of the Commerce Clause is not to relieve those engaged in interstate commerce from their just share of state tax burdens. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1940).

An incidental increase in the cost of doing business as a result of the tax is not sufficient cause to find the tax infringes on the Commerce Clause. *Id.* Where the tax is imposed only on a local activity, and does not aim at or discriminate against interstate commerce, the fact that interstate commerce may occur in connection with or because of the taxed event does not render the tax unconstitutional. *McGoldrick*, 309 U.S. at 48–50.

In *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977), this Court set forth the test for determining whether a state tax improperly impedes Congress' authority to regulate commerce between the states. Under the four-prong test of *Complete Auto*, a state tax is constitutional if the tax: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State. *Id.*, at 279. Oklahoma's tax on the in-state sale of transportation for hire passes all four prongs of the *Complete Auto* test, is compatible with *McGoldrick* and succeeding cases relating to sales taxes, and is not an improper infringement upon the Commerce Clause.

A. The Activity Here Taxed Is The Sale Within The State By A Vendor Physically Present Therein, Which Satisfies The Nexus Requirement.

The bankruptcy court correctly determined that the nexus requirement of *Complete Auto* was met. This Court has established a clear test in sales and use tax cases for determining substantial nexus for Commerce Clause purposes. If the taxable sale occurs within the taxing state by a vendor who is physically present therein, the substantial nexus requirement is satisfied. *Quill Corp. v. North Dakota by and through Heitkamp*, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992); *see also, National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed. 2d 505 (1967); *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977). Here, this test is clearly satisfied, it being stipulated that Jefferson is physically present and operating within Oklahoma and that all of the taxes involved here are upon sales made by Jefferson within the State.

B. The Oklahoma Sales Tax At Issue Is Both Internally And Externally Consistent And Is, Therefore, Fairly Apportioned.

The central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction. *Goldberg v. Sweet*, 488 U.S. 252, 260–61 (1989). To determine whether a tax is fairly apportioned, it must be examined for internal and external consistency. *Id.*, at 261. Oklahoma's sales tax satisfies both of these requirements.

1. *The Oklahoma sales tax is internally consistent because if each state identically taxed the sale of transportation, no multiple taxation could occur.*

Internal consistency requires a tax be structured so that if every state levied an identical tax, no multiple taxation would result. *Goldberg*, at 261. Oklahoma's sales tax is levied on the consumer at the time a sale of transportation for hire occurs. The tax is imposed only on sales occurring within the state. *Liberty Steel Co. v. Oklahoma Tax Commission*, 554 P.2d 8 (Okla. 1976).

As the bankruptcy court, the district court and the court of appeals all correctly determined, since a bus ticket can be sold in only one state, even if every state were to tax

the sale of bus tickets within its borders, no purchaser would be taxed more than once. Thus, as each of those courts properly held, Oklahoma's sales tax is internally consistent.

2. ***The Oklahoma sales tax is externally consistent because the entire activity being taxed occurs in Oklahoma and the possibility of multiple taxation is nonexistent.***

The lower courts held that Oklahoma's sales tax failed the external consistency requirement of the apportionment prong of *Complete Auto* because the tax is not apportioned according to the miles to be travelled in Oklahoma. In doing so, each of the lower courts relied upon *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948). That reliance was misplaced.

Central Greyhound is totally inapposite to this case, and was wrongly relied upon by the courts below. That case involved an *income* tax on the bus company's gross proceeds or total revenues, while the case at bar involves a *sales tax* on the consumer, *measured by* the amount of the purchase. Central Greyhound conducted bus routes that ran primarily in New York but crossed into New Jersey and Pennsylvania for a short period. New York imposed an income tax on the bus company. The amount of tax due was based on the bus company's gross receipts or total income earned. This Court stated the tax was improper because part of the bus company's income was generated by bus routes occurring outside New York. In essence, New York was attempting to collect income tax on income generated outside the state. This case, however, involves a sales tax on the consumer—not an income tax on the bus company. Jefferson's revenues, whether generated in Oklahoma or otherwise, are not involved in this case, nor are they here sought to be taxed. Oklahoma

requires only that Jefferson *collect* a *sales tax* from its Oklahoma consumer. Jefferson became liable only because it failed to do so.

Central Greyhound provides no guidance for this case. The lower courts' reliance on that case stems from a misunderstanding and mischaracterization of the nature of the taxes in question and the activity being taxed. In *Central Greyhound* the tax was levied on the service provider's income, and the taxed activity was the production of that income. However, notwithstanding the court of appeals' refusal below to accept the well-recognized distinction between the sale of a thing and the thing itself, Oklahoma's sales tax is neither a tax on property (the thing purchased) nor a tax on income. *Oklahoma Tax Commission v. Sisters of The Sorrowful Mother*, 97 P.2d 888, 892 (Okla. 1940). The taxable event is the sale itself. *Liberty Steel, supra*, 554 P.2d at 10. Unlike the gross income tax in *Central Greyhound*, levied on the company's revenues from activities conducted in other states, Oklahoma's sales tax is levied on the consumer, and is imposed solely with respect to that consumer's activity *within* the State. *Id.*

Nor, contrary to the district court's suggestion, is there any real potential for multiple taxation. That court assumed the possibility of double taxation existed because, while Oklahoma taxes the consumer at the point of sale, other states could impose an income tax on Jefferson's revenues from transporting its passengers through those states. Thus, according to the district court, if Jefferson passed those taxes on to its customers by increasing the price of its ticket, the purchaser would "effectively" be taxed twice for the trip. The flaw is this reasoning is obvious: First, in order for multiple taxation to occur, the incidence of both taxes must fall on the same taxpayer.

However, it is well established that a tax directly upon a supplier or vendor, even though the burden of the tax is indirectly passed on to the consumer by including its cost in the purchase price, does not amount to an imposition of the tax on the purchaser. *See, e.g., Liggett & Myers Tobacco Co. v. United States*, 299 U.S. 383, 386 (1937). Further, taken to its logical conclusion, the district court's holding would result in a scenario wherein if any state imposes an income tax on a company engaged in interstate transactions, no additional tax of any type could be imposed by any other state upon anyone dealing with that business. Such is clearly not the law. This Court has consistently held that interstate commerce may be made to pay its fair share even if it increases the cost of doing business. *Western Live Stock, supra.* In addition, it is the consumer here that is being taxed, and that consumer is not subject to multiple taxation. Even the district court acknowledged that no other state has sufficient nexus to tax the consumer. J.A. 22.

The opinions below conflict with the applicable decisions of the Oklahoma Supreme Court and of this Court, which have upheld the states' power to tax a discrete transaction which occurs solely within the State's borders. For example, in *Koch Fuels v. State ex rel. Tax Comm'n*, 862 P.2d 471 (Okla. 1993), the Oklahoma Supreme Court analyzed Oklahoma's sales tax under the *Complete Auto* test in the face of a Commerce Clause challenge raising many the same arguments as made here, and, insofar as pertinent hereto,[3] found those statutes constitutional. The

[3] The Oklahoma court did find that a statutory exemption from sales tax on goods manufactured in Oklahoma and transported to another state discriminated against interstate commerce, and vacated the tax assessment for that reason, in (continued...)

well-reasoned opinion of the Oklahoma Court studiously follows, and is completely consistent with, the applicable pronouncements of this Court. *Koch Fuel* involved the sale of fuel oil, with the contract between the parties designating Tulsa, Oklahoma as the point of delivery of the fuel. The fuel was actually delivered outside the State of Oklahoma at various points along an interstate pipeline. The Oklahoma Court reasoned that because a sale is an insular and discrete transaction that can occur only in one place, the sale is taxable only by the state in which it occurs. Further, the court said:

> The sales tax here does not arise because oil is being transported through [or outside] the state, but because Koch sold oil to Burlington Northern in Oklahoma. * * * " The fact that a product has travelled or will travel in interstate commerce does not preclude a tax being levied at the time of its sale." L. Tribe, *American Constitutional Law*, 446 (2d ed. 1988). *See State Tax Commission v. Pacific States Cast Iron Pipe Co.*, [372 U.S. 605 (1963)], and our opinion in *Liberty Steel Company v. Oklahoma Tax Commission*, 554 P.2d 8, 10–11 (Okla. 1976). * * * The fact that Burlington Northern [the purchaser] consumed the oil outside of Oklahoma does not immunize from taxation Koch's sale to Burlington Northern within this State.

Id., 862 P.2d at 478.

[3](...continued)
that case only. That element is not present in the case before this Court. Further, having struck down that particular exemption, the court ruled that, thereafter, there was and would be no constitutional impediment to imposition of the tax in the same type of case. 862 P.2d at 481.

Likewise, this Court has traditionally viewed local sales taxes favorably in the face of Commerce Clause challenges. In *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940), the tax at issue was a New York City sales tax imposed on the sale of goods. New York City levied a tax on the consumer that was collected by the retailer at the time of the sale. In *McGoldrick*, a Pennsylvania corporation maintaining a sales office in New York entered into a contract with a New York buyer for the sale of coal. The coal was mined in Pennsylvania and shipped to New York through channels of interstate commerce. The coal was not shipped until the parties entered into the sales contract. The seller challenged the New York City sales tax, alleging it infringed upon the Commerce Clause due to the fact the goods were shipped through interstate commerce following the sale. This Court held the New York City sales tax valid because the practical effect of the tax did not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if no interstate commerce were involved. *Id.*, at 54, 57–58.

The economic effect of Oklahoma's sales tax is identical to the economic effect of the New York City sales tax in *McGoldrick*. Regardless of the subsequent interstate bus route, it is the *sale* of transportation which creates the taxable transaction. The sale of transportation occurs solely in Oklahoma. This Court has stated that the *taxable transaction* determines if a state tax improperly infringes the Commerce Clause. *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100. Oklahoma's sales tax is levied on the *sale* of transportation and not on the interstate bus route; for that reason, it passes external consistency.

In *Goldberg* the State of Illinois imposed a 5% tax on intrastate telecommunications and also on interstate

telecommunications originating or terminating in the state and charged to an Illinois service address, regardless of where the telephone call was billed or paid.

In upholding the Illinois tax under the four-prong test of *Complete Auto*, the Court held that the tax was internally consistent for apportionment purposes, because "if every State taxed only those interstate phone calls which are charged to an in-state service address, only one state would tax each interstate call." *Id.*, 488 U.S. at 261. Here, the same holds true. If every state levied a tax on the sale of bus tickets within the state, only one state could tax each sale. *See, also, Koch Fuels*, 862 P.2d at 479.

As to external consistency, the Court likewise upheld the tax, rejecting the argument that a tax on the gross charge was not fairly apportioned and could likely result in multiple taxation, saying:

> The Director argues that, *because the Tax Act has the same economic effect as a sales tax*, it can be based on the gross charge of the telephone call. *See, e.g., McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 58 (1940) (sales tax); cf. *D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 31–32 (1988) (use tax); *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue*, 483 U.S. 232, 251 (1987) (gross receipts).
>
> We believe that the Director has the better of this argument. *The tax at issue has many of the characteristics of a sales tax*. It is assessed on the individual consumer, collected by the retailer, and accompanies the retail purchase of an interstate telephone call. Even though such a retail purchase is not a purely local event since it triggers simultaneous activity in several States, cf. *McGoldrick, supra*, at 58, the Tax

Act reasonably reflects the way that consumers purchase interstate telephone calls.

Goldberg, 488 U.S. at 262. [Emphasis added.]

Because of the structure of the Illinois tax statute, which levied the tax without regard to where a call is billed or paid, the Court reasoned that two states—but only two—could tax the same call: the state in which the customer's service address is located and the state where the call is billed or paid. The Court then held that "[t]his limited possibility of multiple taxation, however, is not sufficient to invalidate the Illinois statutory scheme." *Id.*, at 263–64. The Court in *Goldberg* did observe that to the extent that some other state *might* tax the same call, Illinois' credit provision operated to avoid multiple taxation. *Id.*, at 264, 109 S.Ct. at 590. However, nowhere in *Goldberg* did the Court say that *only* a taxing scheme that provided for such credits could survive the test of constitutionality. It is axiomatic that where there is *no* possibility of multiple taxation, there is no need for credit provisions. *See, Koch Fuels*, 862 P.2d at 478–479.

The tax at issue here does not merely have "many of the *characteristics* of a sales tax," it *is* a sales tax. It is applied to a retail purchase that is a purely local event. Differing from—and more localized than—the telephone calls in *Goldberg*, the purchase of a bus ticket in Oklahoma does not trigger simultaneous activity in several states, or even in one other state. Here the sale is complete, and taxable, before any transportation of any kind occurs—*or even if no transportation occurs at all.* Travel is not the taxed activity. A bus ticket need not be used for its sale to be taxable.

In like vein, this Court has approved, for Commerce Clause purposes, state sales taxes on sales of goods

subsequently used solely in interstate or foreign commerce. In *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986), Florida imposed a state sales tax on all aviation fuel sold within the state. The jet fuel was used in intrastate, interstate and foreign transportation. There, the Court accepted that the sale of fuel was a discrete transaction that could occur in only one location, that no threat of multiple taxation could exist, and that the tax did not contravene the Commerce Clause. *Id.*, at 8–9.

In *Itel Containers International Corporation v. Huddleston*, 507 U.S. ______, 113 S.Ct. 1095 (1993), Tennessee levied a sales tax on the lease in Tennessee of cargo containers which were used solely in foreign commerce. The Court upheld the Tennessee Supreme Court's finding that the state sales tax clearly met the *Complete Auto* four-prong test. 113 S.Ct. at 1104. The Court found the Tennessee sales tax to be "a fair measure of the state's contacts with a given commercial transaction in all four aspects of the *Complete Auto* test." *Ibid.* Justice Scalia, in his concurring opinion, stated the Tennessee tax to be "nothing more than a garden-variety sales tax that clearly does not discriminate against foreign [or interstate] commerce." *Id.*, at 1107 (Scalia, J., concurring).

The Oklahoma sales tax is a "garden-variety" sales tax: It is assessed on the individual consumer, collected by the retailer, accompanies the retail purchase of a bus ticket, and reasonably reflects the way that consumers purchase bus tickets—in a single, discrete event—all as recognized and upheld in *McGoldrick, Goldberg, Itel Containers, Wardair* and *Koch Fuels.* The tax reasonably reflects the in-state component of the activity being taxed, and offers no threat of multiple taxation. The lower courts' finding to the contrary, based upon a mischaracterization of the

tax as one on interstate transportation or use *after the sale*, is contrary to the applicable decisions of this Court, and should be reversed.

C. The Oklahoma Sales Tax Does Not Discriminate Against Interstate Commerce.

A tax may be impermissible under the Commerce Clause if it is "facially discriminatory, has a discriminatory intent or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66, 75–79 (1989).

The only court below to address the third prong of *Complete auto*, the bankruptcy court, correctly found that Oklahoma's sales tax is not facially discriminatory, nor was it enacted with any discriminatory intent. It is levied and applied equally at the same rate to all sales of transportation for hire by all common carriers. There is neither the intent nor the effect of conferring a benefit upon local industry or local residents at the expense of interstate commerce or nonresidents.

Nevertheless, the bankruptcy court found the tax discriminatory because, in the court's words, "in failing the apportionment part of the *Complete Auto Transit* test, the Oklahoma tax discriminates against interstate commerce." J.A. 15. That, however, is not the test. Rather, the inquiry is whether the practical effect of the tax is to subject interstate commerce to a greater burden than would result if no interstate commerce were involved. *McGoldrick*, 309 U.S. at 54, 57–58. As the purely local sales tax in *McGoldrick* did not do so, neither does it here. Discrimination here would occur only if bus tickets involving solely intrastate travel were exempted from the tax or taxed at a lower rate, and such is not the case.

D. The Oklahoma Sales Tax Is Fairly Related To Services Provided By The State.

The fourth part of the *Complete Auto* test requires that the tax be fairly related to the presence and activities of the taxpayer within the State. *Goldberg*, 488 U.S. at 266. This part "focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue." *Id.* at 267. In *D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 32 (1988), the Court noted that a taxpayer's receipt of police and fire protection, the use of public roads and mass transit, and the other advantages of civilized society satisfied the requirement that the tax be fairly related to benefits provided by the State to the taxpayer. In this case, both Jefferson and its customers, the true taxpayers, receive police and fire protection, along with other public services, at the locations where Jefferson sells tickets and loads its buses. Jefferson and its customers also receive benefit from police protection and public road maintenance on Jefferson's Oklahoma routes. As the bankruptcy court correctly found, the Oklahoma tax is fairly related to the services provided by Oklahoma.

CONCLUSION

The Oklahoma sales tax at issue, which taxes a single discrete transaction within the State, is directly related to Jefferson and its taxed customers' activities within the State; it is fairly apportioned; it does not discriminate against interstate commerce; and it is fairly related to services provided by Oklahoma. The Oklahoma tax thus satisfies all four parts of the *Complete Auto* test and is constitutionally permissible.

The decision below should be reversed, and this cause should be remanded with instructions to allow and direct the payment of Oklahoma's claims for unpaid sales taxes.

Respectfully submitted,

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